



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, BOSIRE & OWUOR, J.J.A.)
CRIMINAL APPEAL NO. 76 OF 2000
BETWEEN**

**1. ALPHONCE MLONGA
2. JAMES MLWASI
KATOTO.....
...APPELLANTS**

AND

**REPUBLIC.....
.....RESPONDENT**

**Appeal from a judgment of the High Court of Kenya at
Mombasa (Mr. Justice Waki) dated 9/7/99
in
H.C.C.R.A. NO. 349 AND 350 OF 1996)**

JUDGMENT OF THE COURT:

There are two consolidated appeals before us. However, the appeal by James Mlawasi Katoto (James) abates because we received a letter from the prison authorities that he died while serving sentence for the offences the subject matter of the appeals. The only appeal for consideration is therefore, the one by Alphonse Makenzi Mlanga (Alphonse). Alphonse and James were convicted after a trial by the Resident Magistrate, Voi, of two counts, the first of assault causing actual bodily harm contrary to section 251 of the Penal Code, and a separate count each of rape contrary to section 140 of the Penal Code. Alphonse's conviction was based on both direct and circumstantial evidence. The direct evidence given by A.W (PW1) and B.M.J (PW2) the complainants, is to the effect that on 27th January, 1996, at about midnight, Alphonse and James while in the company of a third person who was not arrested met both the complainants near [particulars withheld] in Voi town, as the two were walking to their respective residences from where they worked as bar-maids. James and the other man caught hold of PW1, lifted her up and carried her into a nearby bush and raped her in turns.

Alphonse also caught hold of PW2 and walked her along saying he was going to escort her to her residence. On the way he demanded to have sexual intercourse with her by the road side. PW2 however tricked him that it would be more convenient to do so at her residence, a suggestion which Alphonse accepted. It happened that PW2 lived with her aunt L.K.K (PW4), at [particulars withheld], Voi. But on reaching there as soon as the door was opened for them PW2 entered first and immediately closed the door behind her and thereby shut out Alphonse. Out of anger and frustration for being tricked Alphonse forced the door open and took PW1 away by force, dragged her towards Voi river where he knocked her to the ground, tore her underpants and raped her several times. PW2 testified that as Alphonse was dragging her along from her aunt's house she was shouting his name. Those who responded to her shouts

were threatened with violence and kept away.

Both PW1 and PW2 reported the matter to the police and were later medically examined. Medical reports which were prepared were tendered in evidence by the investigating officer, Clement Mwangi (PW7). In doing so he did not indicate whether he was producing the reports under section 33 or 77 of the Evidence Act, Cap 80 Laws of Kenya, both which permit the production of documentary evidence by persons other than the makers thereof. A government analyst's report on the blood and vaginal swabs of both complainants were similarly produced. We think that it is desirable and essential for the prosecution to specify under which of the two provisions they wish to produce the document or documents. When Alphonse and James were eventually arrested, specimens were taken from them, but the evidence is indeterminate as to what happened to them. On the basis of what the complainants said, the medical and government analyst's reports, and the evidence of PW 4, the trial magistrate convicted both Alphonse and James, and imposed a fine of KShs.5,000 on each of them for the assault charge and an imprisonment term of seven years each on the respective rape charges. Their respective first appeals to the superior court were dismissed.

In this second appeal the appellant (Alphonse) laments as he did in his first appeal, that the failure by the prosecution to call the authors of the medical and government analyst's reports prejudiced him because he was denied the opportunity of cross-examining them on their respective reports. His submission before us was that had the doctor been called he would have asked him if his specimens had traces of a venereal disease which was detected in the vaginal swab of PW 2. With due respect to the appellant, in absence of any report on specimens which were taken from him, whether or not the doctor or government analyst was called to testify they would not have answered that question

. However, notwithstanding what we have said on the issue, it was highly improper for the prosecution to withhold the outcome of the analysis of the appellant's specimens from the court. The prosecution has a duty to produce before court all relevant evidence to aid the court in determining all the matters in issue before it. In an appropriate case the court may take an adverse view of the matter and hold that if such evidence would have been produced, it would have tended to be adverse to the prosecution case.

In the circumstances of this case, however, there is other overwhelming evidence against the appellant that a failure to adduce that evidence does not prejudice the appellant in anyway. Apart from the evidence of PW 2, there is the testimony of PW 4, that the appellant dragged PW 2 from her house at about 2:00 a.m. on 28th January, 1996, and later the same day when PW 2's vaginal swab was examined it was found to have fresh semen. From those circumstances an inference can be drawn that it is the appellant and no other person who had sexual intercourse with her by force. The appellant having dragged PW 2 away violently, it cannot possibly be said that some other person was responsible. PW 2 resisted the appellant throughout signifying that she did not consent to the sexual act.

In the result we have no basis for interfering with the appellant's conviction on the rape count.

As for the charge of assault causing actual bodily harm, the appellant having not raised any issue on it we are not called upon to deal with it.

The appellant's appeal fails and is dismissed in its entirety.

Dated and delivered at Mombasa this 25th day of January, 2001.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR